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No. 97-889

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

CEASAR WRIGHT,

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP., et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST AND CONCERN OF THE AMICUS[1]

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation. With substantial membership in each of the 50 States, it represents more than 3,000,000 businesses and professional organizations of every size and in every sector of the economy. The Chamber thus serves as the principal voice for American employers.

Among its activities, the Chamber represents the interests of its members on important matters pending before the courts and the other branches of government. The Chamber has participated as an *amicus curiae* in numerous cases before the U.S. Supreme Court ("the Court"), frequently on issues involving employment discrimination.[2]

Many of the Chamber's members have employees in collective bargaining units, and the resolution of this case will affect the manner in which these members will resolve statutory employment discrimination claims. Depending on its scope, the Court's decision could affect virtually all of the Chamber's members.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Chamber of Commerce of the United States, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters of consent are filed with this brief.

[2] See, e.g., *Walters v. Metropolitan Educ. Centers, Inc.*, 117 S.Ct. 660 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *Gilmer v. Interstate/Johnsons Lane Corp.*, 500 U.S. 20 (1991); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986).

STATEMENT OF FACTS

This is an action brought under the Americans with Disabilities Act, 42 U.S.C. §§12101, *et seq.* ("ADA"). Petitioner is a former union longshoreman in the Port of Charleston, S.C. In February 1992, he fell at work and fractured his heel. He brought a claim under the Longshore and Harbor Workers' Compensation Act, and asserted that he was permanently disabled. Petitioner's doctor and a three-physician panel confirmed that the disability was permanent. The workers' compensation claim was settled for $250,000, and the U.S. Department of Labor approved the settlement in June 1994.

Seven months later, Petitioner appeared at the hiring hall, presented a doctor's release to return to work, and began working for four stevedoring contractors. When the companies discovered that Petitioner was working, they and their multi-employer collective bargaining representative notified Petitioner's union that Petitioner would no longer be accepted for employment referrals because it had been determined that his disability was permanent. The union advised Petitioner to get counsel.

Petitioner then exhausted his administrative remedies with the EEOC and filed this action. On Respondents' motion, the district court granted summary judgment to the employers, holding that Petitioner was required to arbitrate his statutory ADA claim under the collective bargaining agreement. The Fourth Circuit affirmed in a unanimous, unpublished decision. When Petitioner turned to arbitration, his disability discrimination claim was foreclosed there as stale. This Court then granted *certiorari*.

ISSUES PRESENTED

1. Should the Court overrule *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), and adopt a bright-line rule, by which employees and employers may collectively bargain for enforceable arbitration provisions that extend to statutory discrimination claims?
2. Absent a bright-line rule, should employees and employers be permitted to bargain collectively for enforceable arbitration provisions extending to statutory discrimination claims, where the arbitration provisions explicitly include such claims, full statutory remedies are available, and appropriate steps are present to safeguard against unions that improperly fail to pursue such claims on their members' behalf?

SUMMARY OF ARGUMENT

It is time for the Court to overrule *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). Petitioner argues that *Gardner-Denver* establishes a bright-line rule. Whatever it stood for at the time it was decided, after years of jurisprudence increasingly favoring arbitration, *Gardner-Denver* has left litigants uncertain and the lower courts in conflict. Some lower courts have observed that *Gardner-Denver* might have no remaining currency. *See, e.g., Pryner v. Tractor Supply Co.*, 109 F.3d 354, 365 (7th Cir. 1997) (Posner, J.), *cert. denied*, 118 S. Ct. 295 (1997). The present case is an example of how confusion about *Gardner-Denver* ultimately resulted in an employer burdened with litigation and a grievant with no forum.

In the 24 years since *Gardner-Denver*, Congress and the Court have increasingly favored the arbitration of statutory claims, including employment discrimination claims. What is needed is an up-to-date, bright-line rule, extending to such claims for union employees the same rule as for all other employees, as stated in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

In *Gilmer*, the Court departed from many of *Gardner-Denver's* underpinnings:

> The Court in Alexander v. Gardner-Denver Co. also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That "mistrust of the arbitral process," however, has been undermined by our recent arbitration decisions. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."

500 U.S. at 34 n.5 (citations omitted). The Court also rejected a variety of other arguments that questioned arbitration as a forum. *See id.* at 30-33.

Nevertheless, in *Gilmer,* the Court chose to distinguish *Gardner-Denver,* rather than overrule it. As the Court stated:

> There are several important distinctions between the Gardner-Denver line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. . . . Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA [the Federal Arbitration Act], which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements."

Id. at 35 (citation omitted).

Changed circumstances now address these distinctions and permit the Court to extend to unionized workplaces the *choice* of arbitration as a forum for resolving statutory discrimination claims. The Court should therefore extend *Gilmer* to collective bargaining unit employees. At the least, on a case-by-case basis, the Court should enforce collectively bargained agreements to arbitrate such claims, when the facts meet *Gilmer's* concerns.

ARGUMENT

I. THE COURT SHOULD ADOPT GILMER AS THE BRIGHT-LINE RULE FOR THE ARBITRATION OF STATUTORY DISCRIMINATION CLAIMS OF EMPLOYEES IN COLLECTIVE BARGAINING UNITS.

Taking in reverse order *Gilmer's* concerns with arbitration for collective bargaining unit employees, each of those concerns now has been addressed. First, Congress has gone beyond the Federal Arbitration Act, 9 U.S.C. §§1, *et seq.*, to state in subsequent legislation its support for the arbitration of statutory discrimination claims. Second, the skepticism about collective representation does not take into account significant protections afforded employees, changes in union demographics since *Gardner-Denver*, and the increasing delays and inadequacies of traditional litigation. Third, it has always been up to the courts to determine the scope of a given arbitration agreement: courts need require the arbitration of statutory claims only where the parties have agreed to it. Thus, the concerns stated in *Gilmer* have been addressed, and the Court should extend *Gilmer* as a bright-line rule for union workers.

A. Congress Has Liberally Extended The Policy Favoring Arbitration To Include Statutory Discrimination Claims.

1) The Civil Rights Act of 1991.

In the Civil Rights Act of 1991 ("CRA"), enacted only five months after the Court decided *Gilmer,* Congress endorsed the arbitration of Title VII cases. Pub.L. 102-166, 105 Stat. 1071 (1991). Section 118 of the CRA provides that "where appropriate and to the extent authorized by law, the use of alternate dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII]." 105 Stat. at 1081, *reprinted in* notes to 42 U.S.C. §1981. Not long before, Congress had adopted virtually identical language in the ADA, 42 U.S.C. §12212.

As the majority of lower courts have recognized, the plain language of these provisions endorses alternative dispute resolution methods such as arbitration.[3] Indeed,

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[3] *See Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 150 (1st Cir. 1998) ("In light of the language in the ADA text itself, this legislative history is not sufficient to rebut the presumption in favor of arbitration . . . [W]e do not find any 'inherent conflict' between mandatory arbitration of ADA claims and the policies behind the ADA"); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215, 218 (5th Cir. 1997) (given the express language encouraging arbitration, court rejects argument that the legislative history of the alternate dispute resolution provision in the ADA takes that statute out of the FAA's arbitration requirements); *Seus v. John Nuveen Co.*, 1997 U.S.Dist.LEXIS 8209 at *16 (E.D.Pa.1997) (despite legislative history of section 118, that section encourages arbitration based on a U-4 form, and therefore arbitration is compelled); *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F.Supp. 500, 503-04 (E.D. Mich. 1997) (applying *Gilmer* to require arbitration, finding support in the plain language of section 118); *Johnson v. Hubbard Broadcasting, Inc.*, 940 F.Supp. 1447, 1457-58 (D. Minn.1996) (legislative history of section 118 does not affect its express language, which encourages arbitration).

the Fourth Circuit relied on this language to support its extension of *Gilmer* to a union setting. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 432 (1996) (legislative history of section 118 supports arbitration under a collective bargaining agreement). A minority view relies on a misreading of the legislative history to defeat the statute's plain language.[4]

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[4] *See Duffield v. Robertson Stephens & Co.*, 1998 U.S. App. LEXIS 9284 (9th Cir., May 9, 1998). In *Duffield*, the Ninth Circuit turns section 118 on its head. The court seizes on the words, "where appropriate and to the extent authorized by law," analyzes portions of the legislative history written prior to *Gilmer*, and holds that Congress impliedly overruled *Gilmer* and adopted *Gardner-Denver*. *Duffield* therefore declines to apply *Gilmer* on facts indistinguishable from that case.

The plain language of section 118, when endorsing arbitration "to the extent authorized by law," could only be endorsing *Gilmer*. *See Hubbard v. United States*, 115 S.Ct. 1754 (1995) ("In the ordinary case, absent any 'indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it' "); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. ___, 118 S.Ct. 998, 1002 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

The Court announced *Gilmer* on May 13, 1991; the Senate passed the CRA more than five months later, on October 30, 1991; the House passed it on November 7, 1991; and the President signed it into law on November 21, 1991. Congress is presumed to know existing law pertinent to legislation that it enacts. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Moreover, on the floor in each house, Members expressly referred to *Gilmer*. *See, e.g.*, 137 Cong. Rec. S15472, 15478 (Oct. 30, 1991); 137 Cong. Rec. H9505, 9548 (Nov. 7, 1991). Thus, the words, "to the extent authorized by law," endorsed *Gilmer*.

Searching for an *implied* enactment overruling *Gilmer*, as in looking for any legislation by implication, neglects that it

> is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions. And likewise dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor.

Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring).

The Ninth Circuit reached its result by relying on two committee reports that regarded *Gardner-Denver* as the law that would control arbitration. The reports were issued respectively on April 24, and May 17, 1991. H.R.Rep. No. 40 (I), 102d Cong., 1st Sess. 15-16 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549; H.R.Rep. No. 40(II), 102d Cong., 1st Sess. 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694. Given that one report was published *before Gilmer* and the other just *four days after*, it is not surprising that both assume that *Gardner-Denver* states the law – after all, *Gardner-Denver* did state the law at the time the reports were written. What this neglects is that over the next several months, and well before the CRA's enactment, the Court decided *Gilmer* and Congress referred to it expressly in debate on the CRA. By the time of enactment, *Gilmer* also stated the law.

Finally, Congress knows how to overrule the Court's decisions; indeed, it did so in other respects in the CRA itself. The statute expressly overrules *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), and states as one of its purposes "to respond to [other] recent decisions of the Supreme Court. . . ." CRA, §3(2), Pub. L. No. 102-166, 1991 U.S.C.C.A.N. (195 Stat.) 1071, at 1071. The House Committee on the Judiciary report specified the other cases being addressed. If Congress wanted to overrule *Gilmer*, it would have amended the CRA prior to passage or in subsequent legislation. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989), *overruled on other grounds* in the CRA (in cases of statutory interpretation, *stare*

2) The Federal Arbitration Act ("FAA").

Congress' strong policy in the FAA, favoring arbitration, applies to the vast majority of union employees, and therefore any bright-line rule applying to all union employees must reflect that policy. "The arbitration act covers almost the whole field of arbitrable disputes, only a subset of which (and a small one in 1925) grows out of collective bargaining agreements." *Pryner, supra*, 109 F.3d at 359. The Act extends to any "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . . . " 9 U.S.C. §2.

However, the statute contains the following exclusion: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1. The Court declined to interpret this language in *Gilmer* and has not done so since. 500 U.S. at 25 n.2. The prevailing view has been that this exclusion applies narrowly to seamen, railroad employees, and other transport workers who are directly engaged in moving passengers or goods in foreign or interstate commerce. An alternative view – clearly in the minority – has developed that reads this language to exclude from the FAA virtually all employment contracts.

The majority rule is correct. The District of Columbia Circuit recently wrote a cogent opinion typical of this view, based on traditional principles of statutory construction. *See Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1470-71 (D.C. Cir. 1997) ("every circuit to consider

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decisis has special force, for "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court] has done"). Congress did not do so with respect to *Gilmer*.

this issue squarely has found that section 1 of the FAA exempts only the employment contracts of workers actually engaged in the movement of goods in interstate commerce").

The Seventh Circuit adopted the narrow reading of the exclusion last year. *See Pryner,* 109 F.3d at 356-58. It held that contrary decisions misapply a modern reading of the words, "in commerce," to an Act drafted in 1925, when those words did not carry such a broad meaning. Writing for the court, Judge Posner observed that even commentators who prefer a broad reading of the section 1 exclusion concede that the "prevailing view" is the narrow view, limiting it to cases where the workers themselves are personally engaged in interstate commerce. *See id.* at 358.

The Second Circuit reached the same conclusion, again focusing on the meaning of the language at the time of enactment. *See Tenney Engineering, Inc. v. United Elec., Radio & Machine Workers, Local 437,* 207 F.2d 450, 452-53 (2d Cir. 1953) (fns. omitted) (section 1 exclusion applies only to workers "who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it.").

Most other circuits have reached the same conclusion.[5] The minority view is in the Third and Fourth

[5] *See, e.g., Rojas v. TK Communications, Inc.,* 87 F.3d 745, 748 (5th Cir. 1996) (majority of circuits have determined that the exclusionary clause is to be narrowly construed to exempt only contracts of employment of workers engaged in the movement of goods in commerce); *Asplundh Tree Expert Co. v. Bates,* 71 F.3d 592, 600-01 (6th Cir. 1995) (section 1 "should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce."); *Erving v. Virginia Squires Basketball Club,* 468 F.2d 1064, 1069 (2d Cir. 1972) (section 1 exclusion applies "only to those actually in the transportation industry"); *Dickstein v. duPont,* 443 F.2d 783, 785 (1st Cir. 1971) (courts have generally limited the section 1 exclusion to employees "involved in, or closely related to, the actual movement of goods in interstate commerce"); *Signal-Stat Corp. v. Local 475,* 235 F.2d 298, 302-303 (2d Cir. 1956), *cert. denied,* 354 U.S. 911, *and reh'g denied* 355 U.S. 852 (1957) (same).

Circuits, but these courts view the exclusion alternatively as irrelevant to the present issue (Fourth Circuit) or reach their conclusion without explanation (Third Circuit).[6]

The facts of the case now before the Court might not require resolution of this issue because Petitioner's particular job as a stevedore might bring him within even the narrow reading of the exclusion. However, because the FAA's exclusion applies only to a small fraction of union employees,[7] any bright-line rule must reflect the status of most union employees as falling within the FAA and its pro-arbitration policies.

[6] *See Austin, supra,* 78 F.3d at 879 (applying exclusion broadly but holding that arbitration is required anyway in view of the long-standing and important role that arbitration has played in labor disputes); *Pritzker v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 7 F.3d 1110, 1120 (3d Cir. 1993) (stating its conclusion with little analysis).

[7] For example, in 1996, the total work force was nearly 112 million. Of those, 18 million were in collective bargaining units, but only 1.1 million of these were transport workers. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS ("BLS"), *Employment and Earnings,* Vol. 44, No. 1, at 211-214 (1/97).

3) National labor policy strongly supports arbitration.

Arbitration has long served as the central means for resolving disputes arising in the collective bargaining setting. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). Earlier doubts as to whether agreements to arbitrate labor contract disputes were enforceable were dispelled by *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), and the *Steelworkers Trilogy*. These cases cemented the Court's policy of reliance on and deference to labor arbitration.[8]

The Court has repeatedly reaffirmed the principles first established in the *Steelworkers Trilogy*. *See, e.g., AT&T Technologies v. Communications Workers of America*, 475 U.S. 643 (1986) (reaffirming presumption of arbitrability); *United Paperworkers Intern. Union v. Misco, Inc.*, 484 U.S. 29 (1987) (reaffirming narrow scope of judicial review on the merits).

Thus, in fashioning a bright-line rule, the extension of *Gilmer* would correctly reflect Congressional policy favoring arbitration in the collective bargaining setting.

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[8] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co., supra*, and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). *Lincoln Mills* held that the courts had jurisdiction to enforce arbitration provisions in collective bargaining agreements under section 301 of the Labor-Management Relations Act, 29 U.S.C. §185(a). *Lincoln Mills, supra,* 353 U.S. at 450-51. In *American Mfg., supra*, the role of the courts was limited to determining arbitrability. 363 U.S. at 568. In *Warrior & Gulf, supra*, the Court stated that "doubts [regarding arbitrability] should be resolved in favor of coverage." 363 U.S. at 583. Finally, in *Enterprise Wheel, supra*, the Court held that an arbitrator's award drawing its essence from the collective bargaining agreement must be enforced, even if the court would differ on the merits. *See* 363 U.S. at 597-599.

As the Fourth Circuit observed, even absent the FAA, this is a sufficient legal and policy basis upon which to favor the arbitration of statutory discrimination claims. *See Austin, supra*, 78 F.3d at 882-83.

Thus, Congress has now made certain its policy favoring the arbitration of statutory discrimination claims.

B. Unions' Majoritarian Interests Provide No Basis To Deprive Bargaining Unit Employees Of The Option To Arbitrate Statutory Discrimination Claims.

The *Gilmer* Court also distinguished *Gardner-Denver* by focusing on the tension between collective representation in the union setting and individual statutory rights. When analyzed, this is not a reason to preclude, with a bright-line rule, the arbitration of statutory discrimination claims for collective bargaining unit employees.

1) The employment laws rely on unions to perform representative functions and provide remedies for unions' discrimination or failures to represent fairly.

> This Court long has recognized that a union may waive a member's statutorily protected rights. . . . Such waivers are valid because they "rest on 'the premise of fair representation' and presuppose that the selection of the bargaining representative 'remains free.' "

Metropolitan Edison Co. v. N.L.R.B., 460 U.S. 693, 705 (1983) (citations omitted); *see also, Ford Motor Co. v. Huffman*, 345 U.S. 330, 336-39 (1953) (describing the representative nature of collective bargaining). The Fourth Circuit has applied this principle to a union's agreement to arbitrate statutory discrimination claims, and held that it addressed *Gilmer's* concerns about the representative nature of unions. *See Austin, supra*, 78 F.3d at 885 (citations omitted).

Individual union members also have legal protection. Labor unions fall within the anti-discrimination dictates of Title VII and the other anti-discrimination statutes.[9] Thus, a union's discriminatory decision not to pursue a worker's claim exposes the union to a Title VII claim. *See, e.g., EEOC v. Shopmen's Local 832*, 1997 U.S. App. LEXIS 9570 (2d Cir. 1997) (affirming award in excess of $100,000 to worker whose union would not pursue her discrimination claim). Similarly, when a union fails in its duty to represent workers fairly, the workers may pursue a civil action for breach of the collective bargaining agreement. *See* 29 U.S.C. §185; *Del Costello v. Teamsters*, 462 U.S. 151, 164 (1983). When the collective bargaining agreement incorporates full rights under the discrimination statutes, and the union breaches its duty, the civil action would offer the employee full statutory remedies as damages under section 301.

These two remedial avenues (Title VII and section 301) increase the likelihood that unions will pursue at least strong claims: the more meritorious the employee's discrimination claim, the more obvious will be the unfairness or discriminatory purpose of any decision by the union not to pursue it.

Finally, when a union fails to pursue a meritorious case, public policy may yet be vindicated. The EEOC is of the view that it may bring cases irrespective of a private arbitration. *See* 1997 EEOC *Policy Statement*, No. 915.002 (July 10, 1997) at n. 20, (*citing General Tel.*, 446 U.S. 318, 328 (1990), and 118 Cong. Rec. 4041 (1972)). Collective bargaining unit employees could file a charge with the EEOC, which could pursue a civil action of its own.

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[9] *See* 42 U.S.C. §12111(2) (ADA); 42 U.S.C. §2000e-2(c) (Title VII); 29 U.S.C. §623(c) (ADEA).

Indeed, this could be an excellent use of the Commission's limited resources to develop the law under the statutes for which it is responsible.

2) Labor unions have the need and incentives to address their members' claims of employment discrimination, and are appropriate representatives on such matters.

Organized labor has increasing and much greater diversity in its membership since the *Gardner-Denver* decision in 1974. This, along with vigorous law enforcement, has led to unions' improved records on discrimination.

Specifically, unions have experienced a significant change in demographics since *Gardner-Denver*. At the time of *Gardner-Denver*, 21 percent of American workers who were members of collective bargaining units were women. BLS HANDBOOK OF LABOR STATISTICS: 1977, Table 137 at 102. By 1996, the proportion of women in bargaining units had risen to 40 percent. *See* U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, table 691, at 332 (117th ed. Washington, D.C. 1997); Diane E. Lewis, *Women's Membership in Unions Up to 39.4%*, THE BOSTON GLOBE, at E7 (Mar. 20, 1998). The proportion of Hispanic members in unions has increased by 20 percent between 1983 and 1997. BLS, *Employment and Earnings*, January 1998; BNA, *Union Membership and Earnings Data Book*, 1997 (1996 figures as cited in AFL-CIO website (*http://www.aflcio.org/uniondifference/uniondiff12.htm.*).

The doubling of the proportion of women and the considerable increase in minority membership necessarily requires unions to take into account the needs of such workers in ways not present at the time of *Gardner-Denver*. The time has passed when unions could afford to

ignore or under-represent the interests of minority members; 1998 is not 1974.

The reality of today's union representation obligations is reflected in a sharp decrease in discrimination claims brought against unions. In the 1970's and early 1980's, unions repeatedly were found liable for patterns of discrimination, and often were targeted by the EEOC.[10] More recently, however, these pattern and practice cases and class action suits against unions have become scarce. *See* EEOC, *1982 Annual Report*, at 59 (in 1982, unions were named as respondents in 3,146 charges, which was over 5 percent of all charges filed); *cf.* EEOC, *1994 Annual Report*, at 36 (in 1994, only 590 charges – or 0.6 percent – were against unions). In its recent policy statements on areas of enforcement emphasis, the EEOC makes no reference to unions. *See* EEOC, *1996 National Enforcement Plan, reprinted in* EEOC COMPLIANCE MANUAL (BNA), No. 209, N:2061 (Feb. 8, 1996). The inference is that unions' compliance with the discrimination laws has improved. For those union officials who do discriminate or act unfairly, bargaining unit workers have statutory remedies, and the EEOC also may bring enforcement actions. In perspective, union representation of members' interests in the resolution of employment discrimination claims is sufficient to adopt *Gilmer* for this setting, and such progress should be recognized and encouraged.

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[10] *See, e.g., EEOC v. Local 638 . . . Local 28 of Sheet Metal Workers*, 753 F.2d 1172 (2d Cir. 1985) (and cases cited therein), *aff'd*, 478 U.S. 421 (1986); *EEOC v. Local 638*, 565 F.2d 31 (2d Cir. 1977); *EEOC v. Local 638*, 532 F.2d 821 (2d Cir. 1976); *United States v. Local Union 212*, 472 F.2d 634 (6th Cir. 1973).

3) Driving workers to the EEOC and private attorneys does not and will not decrease employment discrimination or better protect workers' rights.

In their criticism of unions as "gatekeepers" for statutory discrimination claims, Petitioner and his *amici* neglect that the alternatives of representation through the EEOC or the private bar contain pitfalls as deep as workers would find in union representation, but without the recourse that workers have against their unions.

There is no question that the EEOC and the private bar, working with the civil courts, have made great strides in the implementation of the Congressional policy against employment discrimination. However, the Court should also implement Congress' policy favoring arbitration, including the arbitration of discrimination claims. In doing so, the Court should not focus on the negatives of union representation, and compare them to some idealized view of civil litigation as it currently is practiced. Although union representation will fail in certain cases, only an outdated, idealized view of the civil litigation system permits the inference that it offers workers a more accessible, more certain avenue. And, unlike unions, whose failure to support workers may result in civil liability, the EEOC and the plaintiffs' bar work without such checks and balances.

The EEOC as Gatekeeper. The Equal Employment Opportunity Commission testifies annually to Congress that it is not adequately funded to do its assigned tasks. With recent legislative increases in the EEOC's responsibilities and a dramatic increase in charges of discrimination in the 1990's, but with little increase in funding, the EEOC has developed a record-breaking backlog of pending charges, and had to reduce sharply the scope of its activities.

Over the past 17 years, the Commission's staff fell from 3,390 in 1980 to 2,680 in 1997. *See* EEOC, *Budget and Staffing*, posted at EEOC website (*http://www.eeoc.gov/budget.html*.) This decline came at the same time that the agency's obligations expanded, *e.g.*, ADA-charge handling, which now comprises one-fourth of all charges. *See id.* The average caseload per investigator has more than doubled from 55.3 cases in 1990 to 122.0 in 1994. *See* EEOC, *Summary of Enforcement Data and Budget and Staffing Information for the EEOC: FY 1991 through FY 1997*, prepared by EEOC Office of Communications and Legislative Affairs (Dec. 8, 1997). In fiscal 1997, the average time to process a charge of discrimination was 358 days. *See id.* Lengthy as this is, it is *down* from the average of 18 months that charges were pending in 1994. *See* Peter T. Kilburn, *Backlog of Cases Is Overwhelming Job-Bias Agency*, N.Y. TIMES ABSTRACTS, Nov. 26, 1994 at A6; 1994 WL 2757055.

By 1995, the backlog of pending charges had reached an all-time record of 111,345. *See* EEOC, *Enforcement Activities* ("Enforcement Activities"), posted at EEOC website (*http://www.eeoc.gov/enforce.html*). Overwhelmed, the Commission adopted a triage system. *See* EEOC, *Charge Processing Procedures Adopted, reprinted in* EEOC COMPLIANCE MANUAL (BNA), No. 199, N:3067 at 115 (Apr. 19, 1995). Applying the system, the Commission reduced the backlog in one year by *30 percent*. *See* EEOC, *Enforcement Activities, supra*. This massive, rapid reduction in pending charges, without any additional staff, could only mean that cases were closed with far less attention than what the Commission has traditionally viewed as appropriate.[11]

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[11] This was not the first such implementation of drastic measures to reduce a huge backlog. *See* EEOC, *1982 Annual Report* (April 19, 1983), *reprinted in* 212 LAB. L. REP.: EMPLOYMENT PRACTICES (CCH) Issue No. 1323 (Jan. 25, 1984).

These constraints on resources have also limited the Commission's litigation efforts. The Commission's *1983 Litigation Plan* had envisioned the full investigation of all charges and the litigation of all cases where the Commission found a probable violation and yet conciliation had failed. *See 1983 Litigation Plan, published* as *Resolution Modifying Rapid Charge Processing System* (Dec. 12, 1983), *reprinted in* 239 DAILY LAB. REP. (BNA) (Dec. 12, 1983) at D-1. However, in the *1996 National Enforcement Plan*, the EEOC abandoned this goal. *See* EEOC, *1996 National Enforcement Plan, cited in* EQ. EMPL. COMPL. MAN. (BNA), No. 209, *supra*, at 1, 13. Instead, the EEOC decided that it had to forego some good cases to devote resources to others. *1996 National Enforcement Plan*, at 1, 14.

The Commission therefore focused on certain priorities.[12] *1996 National Enforcement Plan*, Part III at 12. But the priorities do not include, for example, sexual harassment cases, race discrimination cases, or most ADA cases. *See* Michael Selmi, *The Value of the EEOC*, 57 OHIO ST. L. J. 1, 14, 21 (1996) (race cases are the largest category of charges filed with the EEOC but "result in the fewest lawsuits" initiated by the EEOC, which seems to "deemphasize race cases"). Even among meritorious cases falling within its new priority limits, the Commission has

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[12] The priorities are: (1) repeated, egregious, outrageous cases, pattern and practice cases, and cases involving facially discriminatory policies; (2) national origin claims involving language, religious accommodation cases, ADA accommodation cases, cases involving the obligation to arbitrate, cases involving the intersection of two or more protected classes; and (3) cases going to the integrity of the EEOC's process.

acknowledged that it still will be unable to litigate some that fail conciliation. *1996 National Enforcement Plan* at 13.

The statistics show how the EEOC's limited resources have affected its litigation efforts. For example, of the nearly 179,000 charges filed at the EEOC in 1994-95, the EEOC only filed 685 lawsuits. EEOC, *1994 Annual Report*, at 6; EEOC, *1995 Annual Report*, at 3. Currently, even where it finds cause to believe there has been a violation and conciliation fails, the Commission litigates only about one-in-ten such cases.[13] Moreover, even when the Commission files litigation, there is no guarantee that it will have adequate resources to pursue it.[14]

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[13] These statistics are drawn from EEOC *Summary of EEOC Data, Budget and Staffing, supra*. In 1997, the EEOC received 80,680 charges, of which the vast majority resulted in no cause findings. *See* Selmi, *The Value of the EEOC, supra*, at 5, 9-14 (concluding that 94.7% of the Commission's charge determinations in 1994 resulted in a no-cause finding). Of these, there were only 3,000 cases, where the Commission found cause but did not conciliate the matter. Still, of these 3,000 remaining cases, the EEOC filed litigation in only 295. EEOC, *Summary of EEOC Data, Budget and Staffing, supra*.

Some commentators have observed that the EEOC finds "no cause" in many cases, not based on merit, but in part from bureaucratic constraints. *See, e.g.*, Lenahan O'Connell, *Investigations Are Work: How Bureaucratic and Legal Constraints Influence the Enforcement of Discrimination Law*, 51 Pub. Admin. Rev. 123 (March/April 1991).

[14] The Commission's *1996 National Enforcement Plan* acknowledges that, as a result of its new priorities, it will have to cut resources even on some cases that are *already pending*. EEOC, *1996 National Enforcement Plan, supra, reprinted in* Eq. Empl. Compl. Man. (BNA), No. 209, N:2061 at 14.

Among the most disturbing examples of the EEOC's litigation practices is *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988). There, six years after initiating a Commissioner's charge of discrimination, the EEOC filed suit. Seven additional

As with unions, the EEOC has "majoritarian" concerns, only its concerns are political. The Commission is administered by Presidential appointees, who respond to the Administration and to Congressional oversight, and the Commission has a constituency of interest groups that lobby for certain priorities and policies.

As with unions, the Commission too has occasionally been found to discriminate, such as against its own employees. For example, it was held liable for race discrimination in a class action brought by its white employees. *Jurgens v. EEOC*, 660 F.Supp. 1097 (N.D. Tex. 1987) (awarding attorneys' fees).

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years later, it tried the case for *10 months* – 185 trial days. The district court ruled for Sears and against the EEOC on all claims. 839 F.2d at 307. After 13 years of preparation, the EEOC could not identify which policy it was challenging on its adverse impact case, at 308 n.5; on disparate treatment, the EEOC did not present even one witness who claimed to have been a victim of discrimination, at 310, 339; it offered no direct or anecdotal evidence of discrimination, at 311; it instead relied almost exclusively on statistical evidence that was "misleading as well as imprecise," developed with an inadequately small sampling, presented by witnesses with no knowledge of Sears or the industry, offered with nothing to support its analytical design, and was misconceived geographically. *Id.* at 316-17, 321, 324, 326-27, 350.

The Seventh Circuit affirmed the judgment for Sears in its entirety. It found that this result followed on the misconduct of the EEOC, whose lawyer was more committed to a particular political advocacy group of his personal liking than to his duties at the EEOC and who had demanded a pre-determination settlement from Sears of *$600 million* on this meritless case to satisfy "outside interest groups," at 357-58. An astonishing *20 years* after the Commissioner's charge was opened, the district court finally closed the case with an award of nearly $600,000 in fees against the Commission. *EEOC v. Sears, Roebuck & Co.*, 1992 U.S. Dist. LEXIS 20046 at *7 (N.D. Ill. 1992).

Given the Commission's constraints, various Administrations have had difficulty bringing people into leadership positions there. For example, between June 1993 and July 1995, no General Counsel was confirmed. *See* EEOC, *1995 Annual Report*, Appendix B (also indicating large gaps in appointments for an interim acting General Counsel during this time).

All in all, workers looking for adequate representation face very real constraints at the EEOC, and there is no reason to expect that, as a general proposition, unions would provide them with less.

The Private Bar as Gatekeeper. The private bar also is an imperfect vehicle for vindicating civil rights. To attract the plaintiffs' bar, cases must offer substantial attorneys' fees. In an ordinary case, statutory fee-shifting offers no more than the *possibility* of collecting regular, hourly rates, contingent on the plaintiff's prevailing.[15] Non-statutory contingent fee arrangements offer little more inducement than statutory fees.[16] This leaves lawyers

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plaintiff can bring related (typically, state law) claims, where

[15] 42 U.S.C. §§1988(b), 2000e-5(k) (shifting fees for prevailing parties). *See Farrar v. Hobby*, 506 U.S. 103 (1992) (civil rights plaintiff who recovers only nominal damages is not entitled to recover fees); Charles Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 Rev. Litig. 301 n.55 (Spring 1993) ("There is evidence that lawyers in private practice tend to reject cases offering less than an 80% chance of some recovery by trial or settlement") (citations omitted); *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987) (multiplier proper only on specific evidentiary finding of exceptional case).

[16] Damages in discrimination cases involving intentional misconduct are capped at $300,000 for even the largest employers, and damages are unavailable in adverse impact cases. 42 U.S.C. §1981a. With the caps, contingent fee arrangements do not offer much incentive to the bar unless the

reluctant to take any case other than a clear-cut case. *See, e.g.*, Eric Schnapper, *Advocates Deterred by Fee Issues*, Nat'l Law J., March 28, 1994, at C1 (lawyers reluctant to take discrimination cases on contingent fee, and many workers cannot afford a retainer).

Because unsuccessful plaintiffs' counsel receive no fees, attorneys cannot ignore a claimant's likely popularity with jurors.[17] For this reason, disfavored minorities are likely to be those against whom discrimination occurs at work and, at the same time, those least attractive to the private bar. For example, how many lawyers would have taken the case of an Iranian-American shortly after the hostage-taking in Teheran? What of a gay worker bringing a same-sex sex harassment case in Colorado immediately after the enactment of Proposition 2? *See Romer v. Evans*, 517 U.S. 620 (1996) (describing Proposition 2); *Oncale v. Sundowner Offshore Services*, 523 U.S. ___, 118 S.Ct. 998 (1998) (certain same sex harassment held actionable). What of a manager who was told he was fired for sex harassment, but contends that the real reason for the

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larger damages might be available.

Partner-level employment lawyers commonly charge hourly rates of $260-$300 or more. *See e.g., Covington v. District of Columbia*, 57 F.3d 1101 (D.C. Cir. 1995) (approving $260 for partner-level work); *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510 (Cal. Ct. App. 1998) (approving $300). With a damages cap of $300,000, and assuming a contingent fee agreement of 1/3, a lawyer will receive greater than hourly rates only if she prevails, obtains the maximum verdict and completes all work through trial in fewer than 350 hours, an unlikely scenario.

[16] *See* Selmi, *The Value of the EEOC, supra*, at 36-37 (attorneys reject "low lost wages cases that stem from isolated practices that a jury deems unworthy of significant damages"); Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes*, 15 Law & Soc'y Rev. 525, 535 n.7 (1981) (cases of less than $10,000 systematically screened out).

termination was his race? Finally, the private bar is subject to its own biases. Lynn Hecht Schafran, *Is the Law Male?: Let Me Count the Ways*, 69 CHI.-KENT L. REV. 397, 404-05 (1993) (male attorney wrongly interpreted female client's distress at outrageous treatment as evidence of hysteria).

The result is that discrimination plaintiffs often appear *pro se*. *See Report of the Working Committees To The Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, ("Second Circuit Report"), Appendix A to the *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, at 279 (Nov. 1997). This draws heavily on the judiciary's resources, especially with a 2,166 percent increase in discrimination cases from 1970 to 1989, compared to a 125 percent increase in the overall civil case load. *See id.* at 280.

Thus, the private bar is not an ideal alternative to union representation at arbitration. Rather, it yields to financial pressure and popular concerns and often leaves without representation those who most need it.

Limitations of civil forums. Even those workers who find their way into the civil system are not guaranteed an ideal forum. Task forces in the Second, Eighth and Ninth Circuits have observed that some district judges display increasing impatience with discrimination cases.[17] Backlogs of civil litigation have become enormous.[18] And,

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[17] *See Second Circuit Report, supra*, at 277, 279-80, 282, 285, 289-90 (Nov. 1997); *see also, Gender Fairness Task Force Report for the United States Courts of the Eighth Circuit*, Ch. 2, IV.A, at 11 (Sept. 1997), *published at (http://www.wast.edu/8th.cir/gender/gftf1.htm); Ninth Circuit Task Force on Racial, Religious and Ethnic Fairness: Final Report*, at 9 (Aug. 1997).

[18] *See, e.g.*, REP. OF THE PROCEEDINGS OF THE JUD. CONF. OF THE U.S. (March 12, 1991 and September 23-24, 1991) and 1991

civil trials lack the finality of arbitration, with post-trial motions, appeals and new trials sometimes adding years to the process. *See, e.g., EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (20 years of investigation and litigation in a meritless case).

In short, absent an overly idealized view of civil litigation today, the imperfections of union representation do not prevent the extension of *Gilmer* to the collective bargaining setting; arbitration with union representation is as useful for this purpose as its civil litigation alternatives.

C. Parties To Collective Bargaining Agreements Can And Do Agree To Arbitrate Statutory Discrimination Claims.

Finally, the *Gilmer* Court distinguished *Gardner-Denver* because the arbitration provision there did not extend to statutory claims and offered no statutory remedies. It has long been the role of the courts to determine whether a particular dispute falls within the scope of the parties' agreement to arbitrate. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-945 (1995) (the courts, and not arbitrators, decide whether an issue is subject to arbitration, unless the parties specified otherwise in the contract); *AT & T Technologies, supra*, 475 U.S.

ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Appendix I to 1991 ANNUAL REPORT OF THE DIRECTOR (Detailed Statistical Tables), Table C 6, AT 212 (1992) (reporting that, in 1992, more than 28,421 cases across the country were still awaiting trial more than three years after they were filed). *See also*, California Trial Delay Reduction Act, CAL. GOV'T CODE §§68600, *et seq.*, Leg. H. 1990 Ch. 1232 §3; (necessitated by frequent five-year delays in civil trials); Harry N. Scheiber, *Innovation, Resistance And Change: A History of Judicial Reform and the California Courts, 1960-1990*, 66 S. CAL. L. REV. 2049 (July 1993).

at 649 (same). In adopting *Gilmer* as the bright-line rule for collective bargaining unit workers, there is no reason to disturb this fundamental rule. If the parties do not agree to arbitrate statutory discrimination claims, the trial court will not require arbitration.

Thus, to permit union officials, employers, workers, and the lower courts ease and certainty of administration, the Court should adopt *Gilmer* as a bright-line rule for the arbitration of statutory discrimination claims in the collective bargaining setting. Under this rule, if the parties choose to provide in the collective bargaining agreement for the arbitration of statutory discrimination claims, their choice will be enforced.

II. IF GARDNER-DENVER HAS CONTINUED VITALITY, THE POLICY FAVORING ARBITRATION REQUIRES THAT UNION EMPLOYEES ARBITRATE STATUTORY DISCRIMINATION CLAIMS IN APPROPRIATE SETTINGS.

If the Court prefers a case-by-case, fact-based analysis, the criteria on which the analysis should turn are those that the Court identified in *Gilmer*, when distinguishing *Gardner-Denver*. Where the collective bargaining agreement addresses such issues as the parties' agreement to arbitrate statutory claims, the availability of full statutory remedies in arbitration, the union's majoritarian concerns, and if necessary, perhaps also the applicability of the FAA,[19] the arbitration provision should be enforced as was the provision in *Gilmer*. Where the provision fails

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[19] As discussed above, the pro-arbitration language in the subsequently enacted CRA and ADA supplies greater policy support for arbitration of these specific statutory claims than would the more general provisions of the FAA.

adequately to address those concerns, it would fall within *Gardner-Denver*, and arbitration would not be required.

Irrespective of the rationales that they offer, most of the lower courts reach results that turn on these considerations. For example, the Eleventh Circuit focused on *Gilmer*'s concerns and held that the arbitration agreement at bar was unenforceable because it was like the one in *Gardner-Denver:* the arbitrator was not given the power to decide statutory claims, and the union had demonstrated that it was "at least unenthusiastic, and perhaps unwilling, to pursue Brisentine's claim to arbitration." *Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 523-25 (11th Cir. 1997).

Reaching the opposite result on different facts, the Fourth Circuit applied a similar analysis in *Austin, supra*, 78 F.3d at 881. There, the collective bargaining agreement expressly required the company to comply with the anti-discrimination laws, and the court held that unions may waive rights as part of collective bargaining and that such waivers are " 'valid because they rest on the premise of fair representation.' " *Id.* at 879-80, 885 (*citing Metropolitan Edison Co., supra*, 460 U.S. at 706). The court held that an agreement to arbitrate statutory discrimination claims is but an example of such a waiver. *Id.*

Significantly, on opposite facts, the same Circuit reached the opposite result. *See Brown v. Trans World Airlines*, 127 F.3d 337 (4th Cir. 1997). In *Brown*, the court denied the enforcement of arbitration after finding that the collective bargaining agreement contained a provision prohibiting discrimination, but nothing to indicate that it went beyond contract rights. *Id.* at 341.

In *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *petition for cert. filed* (Aug. 6, 1997), the parties' agreement to arbitrate apparently was silent as to statutory claims, again bringing the fact pattern – and the

result – within *Gardner-Denver*.[20] The Court also shared *Gilmer's* concern that there might be " 'inherent conflicts between group goals and individual rights that exist in the give-and-take of the collective bargaining process.' " *Id.* at 1453-54 (citation omitted).

Denying arbitration in *Pryner, supra,* the Seventh Circuit again focused on the failure to meet *Gilmer's* concerns: the employees' rights under the collective bargaining agreement were narrower than their statutory rights, and the majoritarian obligations of the union could lead it to disregard the interests of disfavored minorities, such as those who bring discrimination claims. 109 F.3d at 361-63.

Other Circuits have addressed the issue, but their decisions are less instructive.[21]

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[20] The record did not contain the collective bargaining agreement. *See Harrison,* 112 F.2d at 1451-52, 1454 nn.1, 2. Given the employer's silence on the language of the collective bargaining agreement and its failure to put the collective bargaining agreement on the record, the Court inferred that there was no reason to expect any mention in the collective bargaining agreement of arbitrating statutory rights. *See id.* at 1454 n.2.

[21] *Penny v. United Parcel Service,* 128 F.3d 408, 412 (6th Cir. 1997), rejects *Austin* on the oversimplified rationale that *Gilmer* "did not overrule Gardner-Denver but distinguished it. . . ." This point was not lost on the Fourth Circuit, which subsequently applied *Gardner-Denver* in *Brown, supra,* 127 F.3d 337. The Second Circuit read *Gilmer* narrowly but in the distinguishable context of a wage and hour case. *See Tran v. Tran,* 54 F.3d 115, 117 (2d Cir. 1995). The relevant statute (the Fair Labor Standards Act, 29 U.S.C. §§201, *et seq.*) does not encourage arbitration as does Title VII (§118 of the 1991 amendment). . . ." In any event, FLSA cases differ because of the requirement that there be government involvement to resolve them. *See Gilmer,* 500 U.S. at 33; *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981). The Eighth Circuit's decision in *Varner v. National Super Markets, Inc.,* 94 F.3d 1209 (8th Cir. 1996), *cert. denied,* 117 S.Ct. 946 (1997), holds only that the exhaustion of contractual grievance remedies is not a prerequisite to the filing of a civil claim. The court does not consider *Gilmer* or changes in the law; it simply cites *Gardner-Denver* without more. *See* 94 F.3d at 1213.

Responding favorably to *Gilmer,* some unions and employers have adopted in collective bargaining agreements arbitration provisions that expressly extend to statutory discrimination claims, empower arbitrators to award any remedy permitted by statute, and allow the individual employee either to compel arbitration individually (irrespective of his union's wishes) or to have his personal lawyer participate in the arbitration process. However, bargaining unit employees cannot negotiate individual employment agreements. *See* 29 U.S.C. §159(a); *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 62-63 (1975). Thus, if unions cannot act on their behalf to agree to arbitration – even under facts as reassuring as these, then collective bargaining unit employees and their employers will be excluded from prospective agreements to arbitrate. This would defeat the parties' preferences and the policies of Congress and the Court, which strongly favor the arbitration of statutory discrimination claims.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States respectfully urges the Court to overrule *Gardner-Denver* and to adopt *Gilmer* as a bright-line rule, applying to all employees. In the alternative, and at the least, the Court should reject *Gardner-Denver* as a bright-line and permit collective bargaining unit

employees, acting through their unions, to bargain for the arbitration of statutory discrimination claims in appropriate circumstances.

Dated: June 26, 1998

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 97-889

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CEASAR WRIGHT,
Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Waterfront Employers ("NAWE")[1] is a not for profit tax-exempt trade association organized under the laws of the District of Columbia. NAWE's 35 members, private sector stevedores and

[1] Pursuant to Rule 37.3, letters of consent on behalf of both Petitioner and Respondents have been filed with the Clerk of the Court. Pursuant to Rule 37.6, no part of this brief has been authored by counsel for either party; rather it has been authored in its entirety by counsel for NAWE. No monetary contribution for the preparation of this brief was solicited or received from any Respondent or any other entity. This brief was funded solely through NAWE's annual membership dues.

marine terminal operators, operate in over 100 ports in the United States on all three coasts, the Great Lakes, and in the Commonwealth of Puerto Rico. With the exception of Stevens Shipping & Terminal Co. and Strachan Shipping Co., all of the other individual companies named Respondents are NAWE members. These NAWE members also work at numerous other ports throughout the U.S.

Aside from a handful of exceptions, every terminal facility operated by a NAWE member is subject to, and operated under, one or more collective bargaining agreement(s) ("CBA") with one or more local union(s) which supply longshore labor. Unlike most other industries, bargaining in this industry is normally conducted on a multi-employer basis and the hiring hall concept is utilized wherever possible.

Due to the fact that an individual employee may work for numerous signatory employers over the course of a week, month, or year, it becomes imperative—from the standpoint of both the signatory employers and the employees represented by the bargaining agent—that the dispute mechanism provided in a collective bargaining agreement resolve every possible employee claim as quickly as possible, so that each employer fully understands his obligations to the affected employee, and the employees to each employer.

Hence, industry bargaining in several port regions is further characterized by a reliance on arbitration as a quick, efficient and fair system of resolving disputes, including disputes that involve statutory employment claims. Consequently, every NAWE member has a direct interest in affirming the decision of the Circuit Court.

SUMMARY OF ARGUMENT

Amicus submits that *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), presents no bar to affirming the Circuit Court's decision because this early Title VII opinion applies only to CBA agreements that neither provide for

the arbitration of statutory claims nor authorize the arbitrator to resolve such claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court's subsequent seminal opinion finding employment agreement based arbitration suitable to resolve statutory employment claims, resolved any lingering confusion surrounding *Gardner-Denver*.

Gilmer's rationale must now be extended to CBA based agreements to arbitrate statutory claims, particularly in view of Congress' subsequent action, placing language in both the texts of the Americans with Disabilities Act and the Civil Rights Act, expressly encouraging the use of arbitration to resolve claims arising under these two statutes. Despite obfuscatory legislative history, supporters of using arbitration as an *alternative* to legal action prevailed. The Congressional intent behind the two complimentary provisions is absolutely clear, as the Circuit Court noted.

Nothing in the ADA or the CRA, or any other federal law, bars the use of CBA based arbitration as a tool to resolve statutory claims. Such arbitration is in fact warranted by today's workplace environment. Frequently, an employee's CBA claim is so entwined with a statutory claim that CBA-based compulsory arbitration will produce a more equitable result than that sought by Petitioner.

ARGUMENT

I. THIS CASE IS NOT CONTROLLED BY THE COURT'S DECISION IN *GARDNER-DENVER* BECAUSE *GARDNER-DENVER* ONLY APPLIES WHEN THE COLLECTIVE BARGAINING AGREEMENT DOES NOT REQUIRE ARBITRATION OF STATUTORY CLAIMS.

The arguments of the Petitioner and his *amici* rest on their misreading of the Court's decision in *Alexander v. Gardner-Denver*, 415 U.S. 36 (174) ("*Gardner-Denver*").

Gardner-Denver and its progeny [2] stand for the proposition that an arbitrator may not decide issues that are outside the scope of the authority granted to the arbitrator *in the contract*. *Gardner-Denver* involved a collective bargaining agreement ("CBA") that gave the arbitrator the authority to decide only contractual claims and not statutory claims. The CBA in *Gardner-Denver* expressly limited the authority of the arbitrator to the consideration of contractual issues:

> (T)he arbitrator shall not amend, take away, add to, or change any of the provisions of this Agreement, and *the arbitrator's decision must be based solely upon an interpretation of the provisions of this Agreement*. *Gardner-Denver*, 415 U.S. at 42 (emphasis added).

Therefore, in *Gardner-Denver*, it was the contract that barred binding arbitration of the statutory claims and not federal law. The employee in *Gardner-Denver* raised his statutory claims during the latter part of the arbitration; however, the arbitrator did not address the employee's statutory claims:

> On December 30, 1969, the arbitrator ruled that petitioner had been 'discharged for just cause.' He made no reference to petitioner's claim of racial discrimination. *Gardner-Denver*, 415 U.S. at 42.

Because the arbitrator in *Gardner-Denver* had not and could not, under the terms of the CBA, address the employees statutory claims, the employee was free to pursue his statutory claims in federal court independent of the arbitration on the related contractual issues.

Amicus concedes that at one time *Gardner-Denver* may have been subject to other interpretations. Today, *Gardner-Denver* must be viewed through the prospective of the Court's holding in *Gilmer v. Interstate/Johnson*

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[2] *See McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981).

Lane Corp., 500 U.S. 20 (1991) ("*Gilmer*"). *Gilmer* resolved any confusion about the reach of *Gardner-Denver* and its progeny:

> There are several important distinctions between the *Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. *Since the employees there had not agreed to arbitrate their statutory claims*, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. *Gilmer*, 500 U.S. at 35 (emphasis added).

Thus, *Gilmer* could not have been clearer. *Gardner-Denver* did not present the Court with a case where the parties had reached a pre-dispute agreement to arbitrate statutory claims. Instead, the parties had reached the exact opposite agreement, i.e, not to arbitrate statutory claims.

As such, *Gardner-Denver* never addressed the question of whether a pre-dispute agreement to resolve both contractual and statutory claims through binding arbitration was enforceable. Although not dispositive of the issue presently before the Court, *Gardner-Denver* recognized the vital role that arbitration plays in resolving statutory discriminatory claims within the context of a CBA:

> [T]he grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, *including claims of discriminatory employment practices*. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and em-

ployee. *Gardner-Denver*, 415 U.S. at 55 (emphasis added).

For these reasons, the Court's holding in *Gardner-Denver* does not resolve the case now before the Court.

A. *Gilmer* Provided The Court With Its First Opportunity To Consider Whether Pre-Dispute Employment Agreements To Arbitrate Statutory Employment Claims Are Binding On The Parties.

The case in *Gilmer* presented the Court for the first time with the question of whether an industry wide pre-dispute employment agreement requiring arbitration of statutory claims was enforceable. The *Gilmer* Court concluded that such statutory claims were in fact arbitrable: "It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer*, 500 U.S. at 26. The legal foundation for *Gilmer* was the Court's then relatively recent decisions upholding pre-dispute agreements to arbitrate statutory claims arising out of commercial contract disputes.[3]

Notwithstanding *Gilmer*, the question of whether a pre-dispute CBA requiring arbitration of statutory employment claims is binding and enforceable still remains. As a result, this question is presently before the Court for the first time.[4]

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[3] *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

[4] The actual wording of the question presented in the petition for writ of certiorari is: "Was the court below correct in holding . . . that a general arbitration clause in a collective bargaining contract bars an employee covered by the contract from filing his own lawsuit under federal anti-discrimination statute?"

B. The Collective Bargaining Agreement At Issue In This Case Contemplates Arbitration Of Statutory Employment Claims.

Some of Petitioner's *amici* have suggested to the Court that it consider whether the CBA at issue in this case did in fact contemplate binding arbitration of claims under the *Americans with Disability Act*, 42 U.S.C. 12101 *et seq.* ("ADA").[5] *See e.g.*, Brief for the United States and EEOC at 20-21. *Amicus* concedes that if the parties did not agree in the CBA to submit ADA claims to binding arbitration, then and only then, would this case fall squarely within *Gardner-Denver's* holding.

Amicus agrees with the holding of the Circuit Court that the arbitration clause in this case was "particularly broad"and was not required to specifically mention ADA claims to bring arbitration of ADA claims within its scope. *Wright v. Universal Maritime Service Corp.*, 121 F.3d 702, 702 (4th Cir. 1997). The Circuit Court correctly compared the CBA language in this case ("Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment.") with the language of the agreement in *Gilmer* ("any dispute, claim or controversy") and concluded that the CBA language was equally as broad. *Id.* at 702 (citing *Gilmer*, 500 U.S. at 23).

The CBA language in the present case can also be contrasted with the CBA language in *Gardner-Denver*. While the arbitrator in *Gardner-Denver* was limited "solely [to] an interpretation of the provisions of this Agreement," *Gardner-Denver*, 415 U.S. at 42, an arbitrator interpreting the CBA now before the Court would have the broad authority to decide "all matters affecting . . . terms and conditions of employment."

Amicus suggests that, should the Court conclude that the CBA before it now did not, as a contractual matter,

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[5] It is not clear to *amicus* that this question falls within the scope of the question presented for certiorari.

contemplate binding arbitration of ADA claims, the Court would have no need to reach the issue of whether a CBA that does contemplate biding arbitration of ADA claims is enforceable.

II. THE PETITIONER HAS NOT MET HIS BURDEN OF SHOWING THAT CONGRESS INTENDED TO PROHIBIT ENFORCEMENT OF A COLLECTIVE BARGAINING AGREEMENT BASED ARBITRATION OF STATUTORY EMPLOYMENT CLAIMS.

Under *Gilmer*, in order to prevail in this case, the Petitioner has the burden of showing that when the ADA was enacted, Congress intended to preclude binding arbitration of ADA claims under a pre-dispute CBA requiring such binding arbitration.[6] Petitioner has not made and cannot make such a showing.

A. The ADA Cannot Be Read As Barring Arbitration Of ADA Claims Under Collective Bargaining Agreements.

Even if the ADA were silent on the issue of arbitration, the Petitioner could not make the showing required by *Gilmer*. The ADA, however, is *not* silent. The plain language of the ADA indicates that Congress enthusiastically endorsed the use of arbitration:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act.

ADA, 42 U.S.C. § 12212 ("ADR clause").[7]

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[6] See *Gilmer*, 500 U.S. at 35. ("We conclude that Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act.").

[7] Section 513 of the Americans with Disabilities Act of 1990, P.L. 101-336. Section 513 of the ADA is codified at 42 U.S.C. § 12212. Virtually identical language was later included in § 118 of the Civil Rights Act of 1991 ("CRA"), P.L. 102-166, which made the provision applicable to claims filed under Title VII and other laws governed by the amended CRA, including the ADA. Section 118 of the CRA is codified at 42 U.S.C. 1981 note.

Several facts are apparent from the plain language of the ADA's ADR clause. First, Congress took the rare step of including its purpose within the text of the statutory clause itself—to encourage the use of alternative means of dispute resolution. Therefore, any interpretation of the remaining language of the clause must be made in light of, and must be consistent with, this Congressionally stated purpose.

Second, Congress intended to encourage a broad range of alternative methods of resolving ADA disputes. Congress expressly endorsed settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration. This broad list of endorsed alternative dispute resolution methods is a further indication that Congress intended for this clause to be read broadly.

Third, there is no statutory basis for concluding that Congress intended to encourage *non-binding* alternative dispute resolution, but to discourage *binding* alternative dispute resolution. There is no reason, based on the text, for concluding that arbitration of ADA claims should be non-binding than there is for concluding that "settlement negotiations" of ADA claims should be non-binding.

Finally, and perhaps most important to this case, there is no textual basis for distinguishing between the use of alternative dispute resolution within the context of a CBA, versus outside the context of a CBA.

The arguments advanced by Petitioner and his *amici* essentially ask the Court to interpret this clause, inserted into the statute for the express purpose of encouraging the use of alternative dispute resolution, in such a fashion as to thwart this express Congressional purpose. The

Petitioner asks the Court to support this position in the absence of any textual support. And, while the Petitioner and his *amici* have advanced a number of interesting policy arguments in support of their position, policy arguments are not a substitute for the plain language within a statute. Furthermore, such policy arguments are misdirected, since the most appropriate forum for their review is Congress.

B. Nothing In The Legislative Histories Of The ADA Or The CRA Supports Petitioner's Construction Of The Text.

Petitioner urges the Court to view the plain language of Section 513 of the ADA and Section 118 of the CRA encouraging the use of arbitration, in light of the legislative histories of these two provisions, and to exclude CBA based agreements to arbitrate statutory employment claims from their reach. *Amicus* submits that the legislative histories of the two provisions simply do not support this view.

Section 513 of the ADA originated in the House of Representatives, where it was first considered and accepted on May 1, 1990 during House Judiciary Committee markup of H.R. 2273, the bill that eventually was enacted as P.L. 101-336. Congressman Glickman offered the amendment and it was quickly accepted without dissent by voice vote.

While it subsequently became clear that there was some disagreement within the House Judiciary Committee as to the use of alternative dispute resolution in the context of resolving ADA claims, the opponents were unwilling to challenge the amendment directly at the mark-up, presumably because they did not have the votes. At no time during the Committee deliberations on the ADA did either the sponsor of the ADA arbitration clause, or any other member of the Committee express any intent to restrict

the scope of the amendment to non-CBA based arbitration agreements. *See* Original Transcript of the Proceedings of the House Judiciary Committee during mark up of H. Rept. 2273, May 1, 1990, pp. 82-83.[8] By all indications, the members of the Committee thought they had just approved a provision "encouraging" the use of arbitration and other non-judicial alternatives to resolve ADA claims, with the sole qualification being "where appropriate and to the extent permitted by law."

Fifteen days later, without any further Committee action, an explanation of the Glickman amendment was offered in the House Judiciary Committee Report on the ADA. This explanation provided several qualifications to the clear text of the amendment. *See* H. Rept. 101-485, Pt. III, p. 76. The inconsistencies between the plain language of the amendment and the Committee Report itself can only be read as an attempt to frustrate the amendment's clearly stated purpose.[9] The drafters of the Report attempted—without vote or debate—to limit the broad scope of the Glickman amendment in several ways.

First, the authors of the Report argued that the purpose of the amendment was to "supplement, not supplant" the remedies provided by the Act. *Amicus* believes that this concept is inconsistent with the language of the amendment. "Supplement(ing)" the judicial resolution of ADA claims is not an "alternative" to judicial resolution of ADA claims. An ADA amendment turning the use of alternative dispute resolution into a supplement to litigation would not "encourage" the use of such an alternative, rather it would discourage its use. It is clear that under this interpretation, both parties would waste

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[8] Under the House Judiciary Committee's practice, executive session documents such as this are available at the Committee's main office (2138 Rayburn House Office Building) for reading only.

[9] The Conference Report notes that the joint conferees also accepted this point of view. H. Rept. 101-596 of July 12, 1990 at p. 89.

time submitting to the alternative forms of dispute resolution if the losing party were free to seek a subsequent *de novo* hearing in a federal district court.

The authors of the Committee Report also attempted to limit the unambiguous scope of the Glickman amendment. According to the Committee Report, the amendment does not encompass disputes that arise either in the "context of a collective bargaining agreement or an employment contract." In other words, the amendment does not apply to Title I of the ADA. Thus, the Committee Report contradicts the very language of the amendment, which states that alternative dispute resolution "is encouraged to resolve disputes arising *under this Act*." Moreover, there was no discussion by the House Judiciary Committee during its consideration of the amendment in terms of limiting the scope of the alternative dispute resolution clause. Clearly, as indicated by the language of the amendment, the amendment's sponsor and its supporters intended no such limitation.

Finally, the authors of the Committee Report (as opposed to the authors and supporters of the amendment) attempted to codify the *Gardner-Denver* opinion. As discussed above, even assuming *arguendo* that the purpose of the amendment was to codify *Gardner-Denver*, such a codification would not resolve the issue presently before the Court. More fundamentally, it is simply not plausible that an amendment intended to encourage the use of alternative dispute resolution would do so by codifying a decision that rejected its very use. Furthermore, as Congress demonstrated in the Civil Rights Act of 1991, when it wants to codify or reject a Supreme Court decision, it knows how to do so without taking such a subcutaneous route.[10]

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[10] CRA § 3 explicitly codifies one opinion of the Court, *Griggs v. Duke Power*, 401 U.S. 424 (1971) while overruling another, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

Ten months after the passage of the ADA, the Court handed down the seminal opinion in *Gilmer*, in which it held for the first time, that a pre-dispute employment agreement to settle statutory claims through binding arbitration is enforceable. Six months later, Congress enacted the CRA with an alternative dispute resolution clause that was virtually identical to that found in the ADA.

The CRA legislation that ultimately became law was a floor substitute introduced by Senator Danforth that included the alternative dispute resolution clause. This alternative dispute language ultimately became Section 118 of P.L. 102-166. Neither of the two interpretive memorandums placed into the Congressional Record by Senator Danforth indicated his thoughts concerning the proper interpretation of the alternative dispute resolution clause. *See* Cong. Rec. of Oct. 25, 1991 at p. 15276 and Cong. Rec. of Oct. 30, 1991 at p. 29045. Senator Dole—on behalf of himself, several Senators and the administration—did place a memorandum into the record that cited *Gilmer* with favor:

> [I]n light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991). *See* Cong. Rec. of October 30, 1991 at pp. 29034, 29040).

During the House debate on the Danforth substitute, Congressman Edwards included an explanation of Section 118 into the Congressional Record. This explanation mirrored the explanation found originally in the House Report on the ADA (H. Rept. 101-485(III), p. 75). Cong. Rec. of Nov. 7, 1991, at p.30665. Congressman Hyde, on the other hand, included in the record an explanation that was consistent with the interpretation of the Dole memorandum. Cong. Record, Nov. 7, 1991, p. 30683.

While much in the legislative histories of the respective ADR clauses conflict with the plain language of the Glickman amendment and thus is of little value in devining Congressional intent, it is clear that Congress was divided into two distinct camps on the use of alternative dispute resolution in resolving statutory employment claims. Some in Congress vigorously opposed, while others strongly supported, ADR. But the bottom line is that those who supported the use of alternative dispute resolution prevailed when it came to enacting the plain language of the statutes.

III. NO STATUTORY BASIS EXISTS TO DISTINGUISH ARBITRATION SANCTIONED BY *GILMER* FROM CBA BASED ARBITRATION.

As noted above, *Gilmer* has already held that a predispute employment based agreement to arbitrate statutory employment claims is enforceable. Thus, the threshold issue—the enforceability of employment based arbitration —has already been favorably addressed and decided by the Court.

Amicus believes that there is no statutory basis upon which to distinguish *Gilmer* governed arbitration from traditional Labor Management Relations Act governed arbitration.[11] *Amicus* further suggests that finding CBA based arbitration of statutory employment claims enforce-

[11] *See* Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* *Amicus'* position is also supported by the Court's extensive body of CBA-based jurisprudence decided prior to the passage of the principal federal employment protection statutes. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); "Steelworkers Trilogy" (*United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)). While it is true that LMRA based arbitration is seldom governed by the Federal Arbitration Act, LMRA based arbitration is subject to equally rigorous review standards under case law.

able is in the best long term interest of labor-management relations for several reasons.

First, in the modern workplace governed by CBAs, it is almost impossible to resolve contractual employment issues independent of statutory employment issues. Today, given the presence of numerous statutory employment protections, it is likely that when an employer attempts to discipline an employee, that employee will typically raise both contractual and statutory challenges to the employer's action at some point during the CBA governed grievance/arbitration proceedings. These dual challenges frequently turn on the same set of facts, and independently resolution frequently results in inconsistency. The deciding issue ordinarily is a question of fact the motive of the employer. Consequently, the rule of law sought by Petitioner—restricting the enforcement of the arbitrator's authority to decide CBA based contract questions only, while allowing for independent prosecution of a statutory claim—makes little sense.

As an example of just how intertwined contract and statutory claims have become, one need look no further than this case.[12] The CBA below calls for the arbitration

[12] Petitioner's CBA claim is intertwined with several federal statutes beyond the ADA. E.g., The Occupational Safety and Health Administration recently revised its vertical safety standards for the Longshoring and Marine Terminals industry, 29 C.F.R. §§ 1917, 1918 respectively. The following language regarding employee medical conditions, as they concern safe cargo handling operations on marine terminals, was incorporated into each of these two safety standards. "No employee known to have defective uncorrected eyesight or hearing, or to be suffering from heart disease, epilepsy, or similar ailments that may suddenly incapacitate the employee, shall be permitted to operate a crane, winch or other power-operated cargo handling apparatus or a power-operated vehicle." *Id.* 1917.27(a)(2); 1918.98(a)(2) (Federal Register, Vol. 62, No. 143, p. 40142 (July 25, 1997)). Under ADA § 501(b) and the EEOC's implementing regulations, 29 C.F.R. 1630.15(e), these two OSHA safety standards effectively preempt ADA rights and remedies in those cases where an employee is affected with any of

of all matters which cannot be promptly resolved. Presumably this would include disputed work assignments, including Petitioner's initial attempt to be deemed suitable for a work assignment after recovering from a "permanent-total" disability claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq*. The ADA requires that disabled employees receive job assignments based on the concept of "reasonable accommodation," however, it also allows employers to set job qualifications based on safety and health considerations in certain circumstances. ADA § 103(b). Ultimately, this statutory consideration may prove to be a factor in resolving the contract based question concerning Petitioner's suitability to return to work.

If the Petitioner's position prevails, it is doubtful that the Respondents will be able to resolve these conflicting interests. What should employers do if an arbitrator first orders one resolution based on a CBA claim, while independently, a federal court reaches a different conclusion based solely on an interpretation of the ADA, and orders the employers to do another thing?[13] Under the Petitioner's view, there will never be a way to bring these two conflicting claims before a single finder of fact and law for final resolution. As noted above, there is absolutely

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the described conditions. A strict reading of ADA § 501(b) indicates that employer action to comply with the OSHA standards, thus avoiding an OSHA citation, would not trigger ADA liability. *Amicus* further notes that federal district courts do not have subject matter jurisdiction over either the LHWCA or OSH Act, and consequently are without expertise in these areas of the law.

[13] This scenario can also involve the competing interests of two employees which further complicates the employer's predicament. E.g., an employee who receives a new job assignment due to the employer's efforts at providing reasonable accommodation, and in the process bumps another employee with greater job seniority, may cause the second employee to file a statutory discrimination claim. The arbitrator's order may well wind up in conflict with the court's resolution.

no evidence that Congress intended to leave employers in this type of Catch-22 predicament.

Moreover, as previously noted, providing an employee covered by a CBA with two independent challenges to an employer's decision may result in mutually inconsistent decisions. If an arbitrator makes a finding of fact that an employer's action was motivated exclusively by employee malfeasance and nothing else, why should that employee be permitted to argue otherwise in a subsequent legal action?

Finally, if the Petitioner's position were to prevail, the workplace may eventually wind up with two classes of employees in the context of workplace dispute resolution. In the wake of *Gilmer*, appellate courts have endorsed employment based arbitration agreements on may fronts, including agreements quite different than the industry wide employment agreement at issue in *Gilmer*. See, e.g., *Paladino v. Avnet Computer Technologies, Inc.*, —— F.3rd —— (11th Cir. 1998) for a discussion of agreements authorized by that Circuit.

Under Petitioners theory, some employees will get two bites at the apple. First through binding arbitration and second through litigation in federal court if the initial arbitration produces an unsuccessful result. As *amicus* has clearly pointed out above, no statutory basis exists to support an argument that Congress intended for some employees to have their employment claims treated in one fashion, while others are to be treated in a different fashion. Accordingly, *Gilmer*'s umbrella should be extended to cover arbitration of statutory employment claims when CBA based arbitration agreements so provide.

CONCLUSION

Amicus submits that the Fourth Circuit's decision is fully supportable and must be affirmed.

Respectfully submitted,

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